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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 415

DAVID A. GOLDNER,

Petitioner,

—against—

EDWARD S. SILVER, District Attorney, Kings County, State of New York,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1964

No. 415

DAVID A. GOLDNER,

Petitioner,

—against—

EDWARD S. SILVER, District Attorney, Kings County, State of New York,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner seeks a Writ of Certiorari in order to review a judgment of the Court of Appeals of the State of New York, entered on March 26, 1964, affirming an order of the Supreme Court of the State of New York, Appellate Division, Second Department, dated December 27, 1961, disbarring petitioner and ordering his name struck from the roll of attorneys (15 A.D. 2nd 558).

Previous Proceedings

The proceedings below were begun by a petition of Edward S. Silver, District Attorney of Kings County, verified on July 15, 1960, charging petitioner with 33 acts

of misconduct, the issues having been then referred to Hon. J. Irwin Shapiro, Special Referee, to hear and report, together with his recommendations, by order of the Appellate Division dated October 31, 1960.

The Special Referee heard testimony from December 1, 1960, to December 7, 1960, and filed his report, dated March 6, 1961, in which he made four conclusions and recommended disbarment. The motion to confirm the Special Referee's report was granted thereby causing petitioner's disbarment and a motion to stay respondent's motion to confirm the Referee's report was denied on June 21, 1961. Petitioner moved to set aside the report of the Referee which was denied by order dated September 21, 1961, reargument of which was denied by order dated October 5, 1961. A further motion for reargument and reconsideration was denied on May 13, 1963. The Court of Appeals of the State of New York affirmed the order of disbarment without opinion on March 26, 1964 (14 N.Y. 2d 593).

Prior to the institution of the proceedings before Hon. J. Irwin Shapiro, the Judicial Inquiry conducted an investigation in 1958, at which petitioner appeared and testified on two occasions and to which he delivered financial books and records pursuant to a subpoena *duces tecum*. These books and records were not physically returned until after the conclusion of the proceedings before the Special Referee. The subject under investigation was solicitation and related unethical practices in Kings County. Petitioner moved for the return of his records in November, 1958, in the Appellate Division and in January, 1959, before the Special Term of the Supreme Court. Both motions were denied.

Regarding the hearing before the Special Referee, petitioner was represented by counsel, presented evidence, cross-examined witnesses, was given many months to prepare his case and was served with formal charges and particulars of the charges. Not once during the hearing did petitioner object, complain, ask for an ajournment or raise the issue that the retention of his records was illegal or that he had been prevented from preparing his defense. He never alleged that he was prevented from copying, using or working with his records. In the years that have passed subsequent to the return of the books and records, petitioner has not claimed or attempted to show in the Appellate Division. The Court of Appeals, this or any other Court that the records contained items which would have been helpful to him at the hearing before the Special Referee.

The Referee's Findings

The Special Referee concluded that petitioner was unfit to remain a member of the profession of the Law based on the following four findings which were confirmed by the Appellate Division.

1. That the "Respondent failed to provide clients" in some instances "with statements relative to the settlement and disposition of their cases" as required by Rule 4-B of the rules of the Appellate Division First Department. (Charge 7-v, dealt with at p. 47 of this report.)

2. That "Respondent divided fees for legal services with persons other than lawyers for services rendered by such persons in the settlement of legal claims or suits in violation of Canon 34", to wit,

with one James Citroen. (Charge 7-z, dealt with at p. 51 of this report.)

3. That "Respondent wilfully procured and induced clients and witnesses" specifically Dominick Dascoli and Gilbert Zucker "to testify falsely on hearings being conducted by an additional Special Term of the Supreme Court into the conduct of attorneys and others" and more specifically "that Respondent told them to state that they had received the proceeds of certain checks issued in their respective names when, in truth, they had not." (Charge 7-aa, dealt with at p. 54 of this report) and,

4. That Respondent committed perjury before me in his testimony with reference to the so-called "yellow sheets" and the alleged retention by his various clients of the proceeds of the "smaller checks" herein dealt with.

POINT I

Attorneys occupy a unique relationship to the public and are subject to supervision of the judiciary to whom they owe an obligation of complete frankness and cooperation.

Since the origins of the common law, attorneys have occupied a unique position in our society in terms of their role in the need for public trust and confidence in our judicial system. Their conduct, both professional and otherwise, has been traditionally supervised by the judiciary and they have been subject to disciplinary action when their standards have fallen below that thought to be in the best interests of their profession. *Randall* v. *Brigham,* 74 U.S. 532, 19 L. Ed. 285, *Ex Parte Wall,* 107 U.S. 265, 2 S. Ct.

569; *Theard* v. *United States*, 354 U.S. 278, 77 S. Ct. 1274. *In re Schofield*, 362 Pa. 201, 66 A. 2d 675; *Welanko's Case*, 99 N.H. 413, 112 A. 2d 50; *Barnes* v. *Walsch*, 145 Me. 107, 72 A. 2d 813; *In re Genser*, 15 N.J. 600, 105 A. 2d 829. In *Cohen* v. *Hurley*, 366 U.S. 117, 81 S. Ct. 954 the Supreme Court said at pages 123-24:

> "History and policy combine to establish the presence of a substantial *state* interest in conducting an investigation of this kind. That interest is nothing less than the exertion of disciplinary powers which English and American courts (the former primarily through the Inns of Court) have for centuries possessed over members of the bar, incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied. Not only is the practice of such judicial investigations long-established, but the subject matter of the present investigation does not lack a rational basis. It is no less true than trite that lawyers must operate in a threefold capacity, as self-employed businessmen as it were, as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes. It is certainly not beyond the realm of permissible state concerns to conclude that too much attention to the business of getting clients may be incompatible with a sufficient devotion to duties which a lawyer owes to the court, or that the 'payment of awards to persons bringing in legal business' is inconsistent with the personally disinterested position a lawyer should maintain."

It is needless to belabor the importance for preserving the integrity of the bar, but regulation has been extended into areas of business transactions of attorneys and other

dealings although the attorney-client relationship does not exist, attorneys having been held to owe a duty of absolute good faith to the public which must be reflected in conduct of the highest moral character. *Matter of Zanger*, 266 N.Y. 165, 194 N.E. 72; *Matter of Chartoff*, 16 A.D. 2d 277, 227 N.Y.S. 2d 578; *In re Genser*, 15 N.J. 600, 105 A. 2d 829.

In keeping with this special status of attorneys, it has been recognized in most quarters that when the supervision discharged by the judiciary results in disbarment or disciplinary proceedings of some type, such proceedings are not criminal in nature, the discipline to be meted out not being a criminal sentence and punishment being neither the aim or result of the proceedings. *Cohen* v. *Hurley, supra; Randall* v. *Brigham, supra; Ex Parte Wall, supra; Matter of Rothenberg*, 18 A.D. 2d 397, 239 N.Y.S. 2d 591; *Matter of Mogel*, 18 A.D. 2d 203, 238 N.Y.S. 2d 683; *Matter of Broome*, 13 A.D. 2d 657, 213 N.Y.S. 2d 821; *Matter of Kaplan*, 13 A.D. 2d 231, 216 N.Y.S. 2d 310; *In re Judicial Inquiry*, 19 M. 2d 491, 189 N.Y.S. 2d 79.

This sentiment was put forth in *Cohen* v. *Hurley, supra*, at pages 126-27:

> "A State may rationally conclude that the consequence of disbarment is less drastic than that of a prison term for contempt, albeit arguments to the contrary can be made as well. It may also rationally conclude that procedures resulting in greater preventive certainty are warranted when what is involved is the right to continue to occupy a position affording special opportunities for deleterious conduct-opportunities, indeed, created by the State's original certification of the petitioner's merit. In this regard all that New York has in effect held is that

> petitioner, by resort to a privilege against self-incrimination, can no more claim a right not to be disbarred for his refusal to answer with respect to matters within the competence of the Court's supervisory powers over members of the bar, than could a trustee claim a right not to be removed from office for failure to render accounts which might incriminate him. Finally, where illegal or shady practices on the part of some lawyers are suspected, New York could rationally conclude that the profession itself need not be subjected to the disrespect which would result from the publicity, delay, and possible ineffectiveness in their exposure and eradication that might follow could miscreants only be dealt with through ordinary investigatory and prosecutorial processes. 'If the house is to be cleaned, it is for those who occupy and govern it, rather than for strangers, to do the noisome work.' People ex rel. Karlin v. Culkin, 248 N.Y. 465, 480, 162 N.E. 487, 493 (Cardozo, J.).
>
> These bases for affording a procedure in such judicial inquiries different from that in criminal prosecutions are more than enough to make wholly untenable a contention that there has here been a denial either of due process or of equal protection."

This position was not unique since the Supreme Court has always taken this view. The Court wrote in *Ex Parte Wall, supra* 288, that a disbarment proceeding was:

> "In its nature civil, and collateral to any criminal prosecution by indictment. The proceeding is not for the purpose of punishment, but for the purpose of preserving the Courts of justice from the official ministration of persons unfit to practice in them."

Inherent in the Court's power to supervise the dealings of attorneys is the power to examine them under oath and scrutinize their financial and professional records, the right to subpoena having been long established. *Matter of Blumstein*, 253 App. Div. 826, 1 N.Y.S. 2d 598; *Matter of Marlow*, 225 App. Div. 252, 232 N.Y. Supp. 578; *In re Judicial Inquiry, supra.* There are also numerous other examples of government or regulatory bodies properly exercising control over professional or business groups where proceedings evolving from such control must be viewed as different from the normal concept of state action in terms of penal proceedings. *Barsky* v. *Board of Regents*, 347 U.S. 442, 74 S. Ct. 650 (Medical Profession); *Beilan* v. *Board of Public Education, School District of Philadelphia*, 357 U.S. 399, 78 S. Ct. 1317 (teaching); *Lerner* v. *Casey*, 357 U.S. 468, 78 S. Ct. 1311 (transit employee); *Boyd* v. *United States*, 116 U.S. 616, 6 S. Ct. 524 (state banks); *Application of Johnson*, 128 N.Y.S. 2d 874, modified sub. nom.; *Application of Weil*, 283 App. Div. 808, 129 N.Y.S. 2d 501 (horse racing); *Alfaro* v. *Joint Legislative Committee on Professional Boxing*, 36 M. 2d 1018, 234 N.Y.S. 2d 164 (boxing).

The right of the Courts to exercise supervision over attorneys was also recognized by Mr. Justice Harlan and Mr. Justice Frankfurter in a concurring opinion in *Lathrop* v. *Donohue*, 367 U.S. 820, 849 and in his dissenting opinion in *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 456, 83 S. Ct. 328 Mr. Justice Harlan said:

> "But the regulation of professional standards for members of the bar comes to us with even deeper roots in history and policy, since courts for centuries have possessed disciplinary powers incident to the administration of justice."

Similar conclusions were reached by Judge Delehant in *Niklars* v. *Simmons,* 196 F. Supp. 691 wherein it was held that disbarment is a matter within the perogative of the State, the right to practice law not arising from the United States Constitution. The Nebraska disciplinary proceeding was viewed as being neither civil nor criminal, a view taken by New York, and the requirements of due process had been met. Such requirements which were alluded to by the Court were also present in the case at bar. Specifications were filed. The respondent had been represented by counsel. The matter had been referred to a Special Referee who made a report after conducting a full hearing. Exceptions were filed and a decision was made by the Court after due consideration. See also *United States* v. *Anonymous,* 215 F. Supp. 111, 113.

Petitioner had an obligation to respond to inquiry regarding his behavior and to make available his entire financial data. His duty was nothing less than complete frankness and cooperation.

POINT II

Petitioner was not denied due process of law but was given all procedural requisites inherent in the concept of a fair hearing as applicable to proceedings of this type.

The soundness of the legal basis of the disciplinary proceedings in this case being unassailable, the question arises as to what standards of due process must be afforded a respondent. The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation but is unfixed and based upon

considerations of time, history, reason and past course of decisions. *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO* v. *McElroy*, 367 U.S. 886, 81 S. Ct. 1743. Disciplinary proceedings not being penal in nature, it has been held that they need not be formal, nor does the burden of proof beyond a reasonable doubt exist. *Ex Parte Wall, supra; Randall* v. *Brigham, supra; Matter of Mogel, supra.* Procedures can be adopted which considered as a whole in view of the nature of the proceedings may be different from those normally required in criminal prosecutions. *Cohen* v. *Hurley, supra.*

Petitioner complains that his books and records were not physically returned to him prior to the hearings before the Referee thus depriving him of an opportunity to prepare a defense, a right which is concededly included in the concept of fair procedure. The right to which he is entitled though is the opportunity to prepare a defense or explanation and if he is not handicapped in doing so even though his books may be retained illegally, which we argue was not the case here, his rights of due process are not violated. Petitioner bases his contention that the books were illegally retained on his position that no order existed sanctioning the impounding of such records. Yet, he states that he moved for their return in the Appellate Division and then in the Supreme Court, both motions having been denied. It is an exercise in semantics to say that an order denying the request for the return of the books should be viewed differently than one authorizing their retention. The only difference between the two is the identity of the party initiating the motion, the issues litigated and the principles considered therein being the same. The denial of these motions were sufficient authority for retention of the records, if such authority be required by way of Court Order. Implicit in peti-

tioner's argument that no order existed for the retention of his records must be the recognition, which is founded on law, that retention would be proper under certain circumstances. Is it not true then that where such records will be offered in an anticipated disciplinary proceeding involving the special relation of an attorney to the public that there is a duty to retain them? There was ample justification for scrutinizing these records and judicial grounds for keeping them.

It is paramount to remember that petitioner's essential claim is really not that the refusal to return his books constitutes deprivation of his constitutional rights but that his right to prepare his defense was interferred with by their retention. Assuming arguendo that it could be concluded that petitioner, although he did not have physical possession of these records, did have the opportunity to examine them, work with them and copy them, his right to prepare his defense would have remained inviolate. What then occurred in the case at bar? Nowhere does petitioner claim that he was ever denied access to these books and nowhere does he deny that he or his representatives were allowed to work with them. This omission speaks volumes, for the concept of due process does not dictate that a person make use of his opportunity, but only that it be available to him. This is not only true if petitioner did not make use of this opportunity but more so if he did. Petitioner has also not shown how the physical retention of these records have handicapped him. The fact is, the only demand petitioner ever made, via motion and letter, (SR. 181-183) was for the physical return of these records. He never asked according to this record, that he be allowed to use, work with, or copy them. Likewise, at the outset of the hearing no

objection was made nor was this issue raised in any form. At the beginning of petitioner's case (H. 388) nothing was said, nor was objection made when petitioner himself testified (H. 425). There was no objection made when the accountant for the petitioner below testified (H. 210) nor when he referred to these records. Neither was a question raised when the accountant referred to his work sheets (H. 215) although he testified at great length. Actually, petitioner was prepared to meet the testimony of the District Attorney's expert because petitioner introduced much documentary evidence in an effort to dispel the statements of the accountant (H. 450, 452-57 464, 471, 483, 493) and testified at great length regarding his checks (H. 753-57). Petitioner was first apprised of the areas into which investigation was being conducted by his questioning at the Judicial Inquiry and was later specifically advised by the specifications and bill of particulars served on him. He was given exact notice of the charges against him and had many months to prepare his case. The record of the hearings shows that he did so. He introduced evidence, called witnesses, cross-examined and was afforded every opportunity to controvert or explain the charges. He never raised his claim that he had been deprived of an opportunity to prepare a defense nor asked for an adjournment at any point in the hearings. There is no doubt that Special Referee Shapiro would have accommodated him had such a request been made. Even after the hearings were completed when the Referee gave petitioner time to submit a brief this issue was not raised (H. 781-82).

Petitioner sought to demonstrate below that the retention of his records handicapped him by arguing that he could have explained the division of settlement monies re-

garding a client named Dascoli. This argument was not new and is significantly omitted from his brief on this application. It was made in the same language by him at the hearing (H. 276). An examination of the records in this case will show that this holds true regarding all of the items testified to by the expert witness. Petitioner has failed to show even now that any information he could have learned from these records, if in fact he didn't examine them, would have altered in any way anything that occurred at the hearing.

A complete opportunity was presented petitioner to defend these proceedings including all elements of fair procedure and notice applicable to actions of this type. He did not raise his claim at any time during the hearings and has not shown even now how he has been prejudiced.

The retention of petitioner's records could not constitute an illegal search or seizure since this was not a criminal proceeding. *Sackler* v. *Sackler*, 16 A.D. 2d 423, 229 N.Y.S. 2d 61. More protection was given to petitioner in terms of procedure calculated to provide him with a fair hearing than has been required by law. *Sharkey* v. *Thurston*, 268 N.Y. 123, 196 N.E. 766; *Ex Parte Wall, supra; Matter of Mogel, supra; Ames* v. *Dubinsky*, 70 N.Y.S. 2d 706; *Cohen* v. *Hurley, supra; Matter of Broome, supra; Matter of Kaplan, supra.*

It is alleged that *Mapp* v. *Ohio*, 367 U.S. 643, 81 S. Ct. 1684 was decided after petitioner's disbarment but before the pending appeal was decided and that whether the decision is to be applied retroactive to this case is an issue here. Further it is claimed that a retroactive application would dictate a reversal. This is plainly not so. The Court of Appeals has already decided that *Mapp* is to be applied

to all cases in New York where appeals are still pending, *People* v. *Loria*, 10 N.Y. 2d 368, 179 N.E. 2d 478 and since *Mapp* was actually discussed in the briefs and upon argument in that Court in this case, it is evident that the Court of Appeals considered whether the obtaining and retention of petitioner's records constituted an illegal search and seizure. *Malloy* v. *Hogan*, U.S. , 84 S. Ct. 1489 is not really applicable because in this case petitioner never refused to answer questions or give evidence on the grounds of self-incrimination. The statement in *Cohen* v. *Hurley*, *supra*, 125 that:

> "Basic to consideration of this aspect of petitioner's case is the fact that the State's disbarment order was predicted not upon any unfavorable inference which it drew from petitioner's assertion of the privilege, (citations omitted) nor upon any purpose to penalize him for its exercise, but solely upon his refusal to discharge obligations which, as a lawyer, he owed to the court."

is even more applicable with respect to the case at bar than the *Cohen* case. No privilege or claim was raised at any stage of the proceedings and no showing of a lack of reasonable opportunity to prepare a defense, which concededly is due petitioner, has ever been shown. The high duty owed by an attorney to the judiciary as well as the logical and well founded view of the proceedings below as being non criminal sustain the legality of requiring complete financial disclosures such as occurred in the case at bar.

POINT III

The findings of the Special Referee were not improper.

The third and fourth findings of the Special Referee it is claimed were objectionable because petitioner had no notice of them. This is not improper because the Referee had no way of foretelling prior to the hearing that the circumstances would occur that would support these findings. When such is the case, there is no tenet of law preventing proper action by the hearing authority. *Ex Parte Wall, supra; Bradley* v. *Fisher,* 13 Wall 335, 80 U.S. 335. The Referee can draw all reasonable inferences from the evidence presented which reason and experience dictate. This would be true even if the instant proceedings were criminal but more so since they are not. *Tot* v. *United States,* 319 U.S. 463, 63 S. Ct. 1241; *Justice* v. *Lang,* 52 N.Y. 323; *People* v. *Terra,* 303 N.Y. 332, 102 N.E. 2d 576; *Matter of Mogel, supra; Matter of Broome, supra.*

The result of the Referee's conclusion had no penal effect and by no stretch of imagination could petitioner have been deemed guilty of a crime. These findings were within the function of the Referee and were carefully considered by the Appellate Division before its decision was rendered. The case of *In re Oliver,* 333 U.S. 257, cited by petitioner at page 23 of his brief is inapplicable. There the inquiry was being conducted by a "one man grand jury" and the defendant was not afforded an opportunity to be represented by counsel or have a full and fair hearing. The adjudication of contempt was also largely based on the testimony of one witness who had previously testified in

secret and who was not subjected to cross examination by the defendant. Likewise in *Greene* v. *McElroy,* 360 U.S. 474, 79 S. Ct. 1400, cited by petitioner, the accused was also not permitted to confront or cross examine witnesses nor was he allowed to examine files, minutes or records on which the revocation of his security clearance was based. The procedures below were imminently fairer in this case than in any other case referred to by petitioner.

CONCLUSION

The petition for the Writ of Certiorari should be denied.

Dated: Brooklyn, New York
December 1, 1964.

Respectfully submitted,

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Of Counsel